Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM 1995

Robert S. Mirin,
Petitioner, Pro Se

v.

Paul Eyerly, III, and
Press Enterprise Newspaper,
Respondents

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Robert S. Mirin, Esq.
8150 Derry Street
Harrisburg, PA 17111-5260
(717) 561-1515

Pro Se Petitioner

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QUESTION PRESENTED FOR REVIEW

I. Do the terms of sections 362 and 108 of the bankruptcy code setting forth an automatic stay, toll the time within which Petitioner must file a petition for a writ of certiorari?

II. Is the inadvertent failure to include Appellants' name in the caption of the notice of appeal present, under Federal Rule of Appellate Procedure 3(c), a jurisdictional bar to review where the subject matter of the appeal is clearly indicated and the attorney is the only party who has standing to appeal sanctions imposed under 28 U.S.C. §1927 and the intention to appeal is clear to both the court and all parties involved?

PARTIES

The parties to these proceedings include the petitioner, Robert S. Mirin, Esq., and the respondents, Paul Eyerly, III, Publisher and Press Enterprise Newspaper.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgments and opinions of the Third Circuit Court of Appeals entered in this matter on April 27, 1995 and June 2, 1995, and the Order of the Middle District of Pennsylvania entered January 19, 1995.

OPINIONS BELOW

The April 27, 1995 Order of the United States Court of Appeals for the Third Circuit, which dismissed the appeal due to lack of jurisdiction, is reproduced in Appendix A.

The January 19, 1995 Order of the United States District Court for the Middle District of Pennsylvania, which imposed sanctions, is reproduced in Appendix B.

The June 2, 1995 Order of the United States Court of Appeals for the Third Circuit, which denied a rehearing en banc, is reproduced in Appendix C.

The September 28, 1995 order of the United States Court of Appeals for the Third Circuit, which declined to reissue its June 2, 1995 order, is reproduced in Appendix I.

STATEMENT OF JURISDICTION

The order awarding sanctions against Petitioner was entered on January 19, 1995. The United States Court of Appeals for the Third Circuit denied the appeal on April 27, 1995. Petitioner filed for bankruptcy on May 11, 1995. An order denying a petition for rehearing was entered on June 2, 1995 and was thus invalid under 11 U.S.C. §362. The automatic stay of the bankruptcy code was lifted on August 28, 1995. The Third Circuit denied a September 1, 1995 request to reissue its June 2, 1995 order on September 28, 1995. This Court has jurisdiction to review the judgment in question by writ of certiorari pursuant to 28 U.S.C. §1254.

THE RULES INVOLVED

United States Bankruptcy Code
11 U.S.C. §108. Extension of time, provides:
(a) If applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period within which the debtor may commence an action, and such period has not expired before the date of the filing of the petition, the trustee may commence such action only before the later of --

(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or

(2) two years after the order for relief.

(b) Except as provided in subsection (a) of this section, if applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period within which the debtor or an individual protected under section 1201 or 1301 of this title may file any pleading, demand, notice, or proof of claim or loss, cure a default, or perform any other similar act, and such period has not expired before the date of the filing of the petition, the trustee may only file, cure, or perform, as the case may be, before the later of --

(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or

(2) 60 days after the order for relief.

(c) Except as provided in section 524 of this title, if applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period for commencing or

continuing a civil action in a court other than a bankruptcy court on a claim against the debtor, or against an individual with respect to which such individual is protected under section 1201 or 1301 of this title, and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of --

(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or

(2) 30 days after notice of the termination or expiration of the stay under section 362, 922, 1201, or 1301 of this title, as the case may be, with respect to such claim.

11 U.S.C. § 362(a) provides:

(a) Except as provided in subsection (b) of this section, a petition filed under section 301,302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 [15 USCS § 78eee(a)(3)], operates as a stay, applicable to all entities, of --

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
(4) any act to create, perfect, or enforce any lien against property of the estate;
(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;
(6) any act to collect, asses, or recover a claim against the debtor that arose before the commencement of the case under this title;
(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and
(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

Federal Rule of Appellate Procedure 3(c) provides:

(c) CONTENT OF THE NOTICE OF APPEAL. A notice of appeal must specify the party or parties taking the appeal by naming each appellant in either the caption or the body of the notice of appeal. An attorney representing more than one

party may fulfill this requirement by describing those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X." A notice of appeal filed pro se is filed on behalf of the party signing the notice and the signer's spouse and minor children, if they are parties, unless the notice of appeal clearly indicates a contrary intent. In a class action, whether or not the class has been certified, it is sufficient for the notice to name one person qualified to bring the appeal as representative of the class. A notice of appeal also must designate the judgment, order, or part thereof appealed from, and must name the court to which the appeal is taken. An appeal will not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice. Form 1 in the Appendix of Forms is a suggested form for a notice of appeal.

STATEMENT OF THE CASE

This revised brief is submitted pursuant to the November 3, 1995 Order of Justice Souter and in order to comply with Rule 33 of the Supreme Court Rules.

The underlying action was commenced with the filing of a Writ of Summons in the Pennsylvania Court of Common Pleas for Columbia County on January 11, 1994. It was brought against various defendants including the Press Enterprise (a newspaper) and Paul Eyerly (its

publisher) referred to as the "Media Defendants". Under Pennsylvania rules of procedure, the Media Defendants ruled Plaintiffs to file a complaint, and a complaint was filed in federal court.

The Media Defendants were the only Defendants who filed a rule to file a complaint in the Common Pleas Court for Columbia County at that time. A complaint reflecting federal civil rights and state pendant claims was filed on March 2, 1994, in the Williamsport, Pennsylvania division of the United States District Court for the Middle District of Pennsylvania pursuant to 18 U.S.C. §3231 and 28 U.S.C. §1331. The Media Defendants contemporaneously sought entry of a state judgment of non-pros which was contested by a motion to open or strike.[1]

The Media Defendants responded to the complaint and filed a motion under Rule 12(b) to dismiss.[2]

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[1] That state court "non-pros" issue remains unresolved due to the subsequent course of events surrounding this case (i.e. its removal to federal court).

2 The use of the state court writ of summons procedure and the initial federal complaint involve satisfaction of the state court statute of limitations for limited components of the litigation. (i.e. the libel, slander, invasion of privacy aspects of the conduct at issue were governed by the one (1) year statute of limitations under Pennsylvania law. 42 Pa. C.S.A. 5523.) The balance of the claims including the other state law claims have longer two (2) year statutes of limitations. See 42 Pa. C.S.A. §5524. The conduct alleged to be defamatory involved extensive newspaper publications which inaccurately alleged facts injurious to Plaintiff Michael Boykin, who on or about January 11, 1993 was arrested but after

On April 20, 1994 the Bloomsburg University defendants "ruled" Plaintiffs to file a second state court complaint. Plaintiffs were thus constrained by state procedure to file a second, virtually identical, state court complaint.

On May 17, 1994, the federal district court dismissed all claims against the Media Defendants (Press Enterprise and Eyerly). On May 31, 1994, the Bloomsburg University

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incarceration and trial was exonerated in late October, 1993 of rape and criminal misconduct. In the underlying litigation, it is contended, inter alia, that the defendants collectively engaged in various acts, such as the media defendant's publications, University publication of 9500 letters and dissemination of defamatory of recorded telephone messages as well as published newspaper articles. (Only the newspaper publication issues involved the Media Defendants.) When Plaintiff Michael Boykin was exonerated by jury verdict in late October, 1993, most of any one year statute of limitations period had expired. This left only a brief time in which to satisfy that applicable statute of limitations. Thus, a writ of summons was filed in state court to toll the running of the statute of limitations and to facilitate Plaintiffs' further pre-complaint analysis of the legal ramifications of the defendants' extended course of conduct. Mitchell v. Bloomsburg University, et al. (95-7347 & 95-7360) is also currently on appeal to the United States Court of Appeals for the Third Circuit and involves many similar and interrelated substantive issues. Mitchell was lodged in the same division of the Middle District of Pennsylvania shortly before the inception of the Boykin litigation. Mitchell has not direct relevance insofar as the Media Defendants and the issues of sanctions are concerned, but there is a similarity of substantive issues, as referenced by the judge in this case, with regard to Plaintiffs' theory of the case as to the Media Defendants under Employment Div. v. Smith, 494 U.S. 892 (1990) and natural law jurisprudence as articulated by Judge Bork in The Tempting of America. Robert H. Bork, (The Free Press, 1990).

defendants petitioned for removal of the second/state court complaint to the federal district court.

After disposition of the Media Defendants' 12(b) motions, sanction hearings were held beginning October 21, 1994. These hearings consumed six four-hour-days of testimony. Sanctions in the amount of $52,980.47 were imposed pursuant to 28 U.S.C. §1927. On appeal it was asserted that bias against Petitioner and civil rights litigation in general, as demonstrated by the judge's conduct in interrupting Petitioner, reprimanding Petitioner for imaginary interruptions, and blatantly treatment of opposing counsel with great deference, as well as blatant errors of law, resulted in the draconian sanctions order. [3]

Petitioner lodged an to appeal of the sanctions award to the United States Court of Appeals for the Third Circuit by timely filing a Notice of Appeal on February 14, 1995. However, the notice of appeal, inadvertently. did not designate Petitioner in the caption as the appellant. The notice reads "Notice is hereby given that Plaintiffs ... hereby appeal to the United States Court of Appeals for the Third Circuit from the final judgment from an order imposing sanctions for attorney's fees on plaintiffs' counsel Robert S. Mirin, Esquire, entered on the nineteenth day of January, 1995." The notice is signed by Robert S. Mirin,

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[3] This litigation was the first case for Counsel under the 1993 amendments to the federal rules of civil procedure and the first courtroom involvement with this particular judge.

Petitioner herein.

On March 31, 1995, Petitioner filed a motion to substitute himself as the appellant. The motion was denied on April 27, 1995. The Third Circuit denied the motion, indicating that it lacked appellate jurisdiction to hear this appeal under the rationale of Bartels v. Sports Arena Employee Local 137, 838 F.2d 101 (3rd. Cir. 1988)[4]. Petitioner filed a request for a rehearing to the Third Circuit on May 11, 1995. Concurrently, as a result of the sanctions, Petitioner found it necessary to file for a Chapter 13, debt reorganization, bankruptcy on May 23, 1995. The Third Circuit denied the rehearing by an order dated June 2, 1995.

Subsequent to the lifting of the bankruptcy stay on August 28, 1995, Petitioners requested that the Third Circuit reissue the June 2, 1995 order. This request was denied on September 28, 1995. Petitioner now also seeks to have this Court grant a writ of certiorari to decide both the issue of the effect of 11 U.S.C. §108 and §362 on Debtor's/Petitioner's right to appeal where the notice of appeal did not formally identify the appellant.

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[4]In Bartels, the clients unsuccessfully attempted to appeal sanctions imposed against the law firm that represented them in litigation. The law firm itself had no intention of appealing.

ARGUMENT

I. THIS PETITION IS TIMELY FILED BASED ON THE LIFTING OF THE AUTOMATIC STAY PURSUANT TO THE BANKRUPTCY CODE.

This petition is timely filed based on the effect of the stay provisions of the Bankruptcy Code upon the computation of time for filing this writ. The automatic stay of the bankruptcy code, 11 U.S.C. §108, and §362, affected the time frame for final filing of this petition. Under the bankruptcy code, there are three possible dates for filing.

First, Petitioner has 90 days, under Supreme Court Rule 13.4, from the date of a valid order denying a rehearing. Since the Third Circuit has not reissued this order, Petitioner asserts that 90 day period did not commence until triggered by the lifting of the stay.

Second, because Petitioner could not appeal while the automatic stay was in effect, he has 90 days from the lifting of the automatic stay (August 28, 1995) to file this petition and institute an appeal to this Court. Thus, Petitioner would have had until November, 26, 1995 to file this petition.

Finally, §108 of the bankruptcy code grants Petitioner the unexpired balance of the stay period from the date of the lifting of the automatic stay to "continue a civil action." Under this theory, Petitioner had the balance of the certiorari period, running from the lifting of the stay (i.e., only the period since the lifting of the stay on August 28th has lapsed)

reduced by the period between the Circuit's initial order of April 27, 1995 and the statutory imposition of this stay on May 23, 1995 in which to file. Twenty six (26) days would have elapsed between the appellate court order and the bankruptcy filing, and sixty four (64) days remained after the August 28, 1995 lifting of the stay remained available to Petitioner.[5]

A. The Time for Filing this Petition Should Be Viewed as Tolled by the Stay Provisions Under 11 U.S.C. §362.

The automatic stay of the bankruptcy code stays all proceedings against the debtor. "This is so because §362's stay is mandatory and 'applicable to all entities', including state and federal courts." Maritime Elec. Co. v. United Jersey Bank, 959 F.2d 1194, 1206 (3rd Cir. 1991). Additionally, "the automatic stay of proceeding is applicable at both the trial and appellate levels." Cathey v. Johns-Manville Sales Corp., 711 F.2d 60 at 61 (6th Cir. 1983). In the case at bar, Petitioner filed for reconsideration on May 11, 1995. On May 25, Petitioner filed a bankruptcy petition. At that point, the operation of the automatic stay prevented the Third Circuit, absent a lifting of the stay, from proceeding any further. Thus, the June 2, 1995 order was issued while the stay was in effect. This view is consistent with the

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[5] The original petition was accepted for filing by the Clerk on November 3, 1995.

decisions of a majority of the Circuit Courts of Appeals. See, e.g. In re 48th St. Steakhouse, 835 F.2d 427 (2nd Cir. 1987), Maritime Elec. Co., 959 F.2d 1194, Cathey, 711 F.2d 60, Sheldon v. Munford, Inc., 902 F.2d 7 (7th Cir. 1990), Farley v. Henson, 2 F.3d 273 (8th Cir. 1993) and In re Shamblin, 890 F.2d 123 (9th Cir. 1989).

June 2, 1995, however, does not serve as the date from which the time for filing this petition is computed under Supreme Court Rule 13.4. The automatic stay was lifted on August 28, 1995. Although the Third Circuit was asked to reissue its order denying a rehearing so that the 90 day period can commence; the Circuit Court denied this request on September 28, 1995, therefore the August 28th order, lifting the stay, is relied upon to reactivate the time period commenced originally by the Third Circuit's prior order.

B. The Automatic Stay Prevents the Debtor from Filing an Appeal to This Court While It Is in Effect.

Petitioner could not appeal to this Court while the automatic stay of the bankruptcy code was in effect. The automatic stay prevents a debtor from filing a petition for a writ of certiorari until the automatic stay is lifted. Appeals in general are barred while the automatic stay is in effect because appeals, even brought by the debtor, involve actions against the debtor. A majority of the circuit courts have held that where an action was brought against the debtor, any appeal from a judgment is invalid while the automatic stay is

in effect. See Farley, 2 F.3d 273. Additionally, such appeals are barred regardless of whether the debtor is the appellee or appellant. See Id., and Cathey, 711 F.2d 60. For these reasons, Petitioner did not have the jural capacity to appeal until the automatic stay was lifted on August 28, 1995.

The automatic stay was not terminated until August 28, 1995. Since the filing of this petition is a continuation of a civil action, Petitioner had at least, pursuant to §108(c), sixty-four days from August 28, 1995 in which to file this petition. (The balance of the time from the Circuit's initial order to the filing of the bankruptcy petition.)

II. THIS COURT SHOULD RESOLVE THE CONFLICT AMONG THE CIRCUIT COURTS AS TO THE MEANING AND APPLICATION OF FED. R. APP. P. 3(c).

The mechanical application of Rule 3(c), to bar valid appeals, is inconsistent with the language, purpose, and spirit of the Federal Rules. It affects the rights of litigants, including Petitioner, who seek to have their cases expeditiously heard on appeal.[6] Several of the circuits, including the Third Circuit, continue to restrictively interpret Fed. R. App. P. 3(c) contrary to the letter and spirit of the

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[6]Of equal importance are the underlying substantive issues involving the parameters of vigorous advocacy, federal/state jurisprudence, judicial checks and balances within the federal court system, legal professionalism, civil rights law and the First Amendment.

rule. These circuits are improperly and unjustly restricting access to the appellate courts and denying the right to appeal based upon an unduly restrictive readings of Rule 3(c).

The circuit courts do not agree upon the application of Rule 3(c) in cases where a party's intent to appeal is clear but the notice of appeal reflects a mechanical or technical omission. Accordingly, this Court should grant certiorari and clarify the application and scope of Fed. R. App. P. 3(c).

A. The Circuit Courts Have Inconsistently Applied this Court's Ruling in Torres v. Oakland Scavengers Co.

The starting point for this conflict between the circuits emanates from this Court's interpretation of a prior version of Fed. R. App. P. 3(c) as construed in Torres v. Oakland Scavengers Co., 487 U.S. 312 (1988). There, Torres, the appellant, was one of 16 persons seeking intervention in the federal litigation on remand. The complaint, seeking intervention, was dismissed by the district court. Earlier, on appeal to the circuit court, both the notice of appeal and the order of the court of appeals omitted Torres' name. This Court held that under the facts of that case, failure to file a notice of appeal in accordance with the specificity requirements of Fed. R. App. P. 3(c) presented a jurisdictional bar to the appeal. Moreover, the failure to identify the appellants was more than an informality. In the appeal,

sub judice, conversely, the identity of the proper appellant is referenced in the body of the notice of appeal and the proper appellant signed the notice of appeal.

The circuit courts have varied widely on the application of Torres to a range of fact patterns. More specifically, the circuit courts disagree on how to apply Torres when there is only one possible appellant, as in this case, as opposed to the numerous possible appellants in Torres. Compare Aetna Life Ins. Co. v. Alla Med. Servs., 855 F.2d 1470 (9th Cir. 1988) (holding, under facts virtually identical to the case at bar, that the appeal was proper) with F.T.C. v. Amy Travel Serv., 894 F.2d 879 (7th Cir. 1989) (holding that attorney must appeal in his own name). In this case, Petitioner is the only possible appellant with standing to contest the sanctions order of January 19, 1995, which is the order referenced specifically in the notice of appeal.

In 1993, Congress attempted to lessen the satellite litigation caused by Torres by amending Fed. R. App. P. 3(c). See Fed. R. App. P. 3(c) 1993 Advisory Committee's Notes. The amendments sought to add clarity to the Rule and support an interpretation that allows this appeal to proceed. However, the circuit courts still do not agree uniformly as to the application of Rule 3(c).

B. The Conflict Among the Circuits, Mandates a Ruling by this Court.

The circuit courts of appeal have divided on the issue of whether an appellate court has jurisdiction over the appeal of a party who inadvertently fails to include his or her name in the notice of appeal from an order where the intent to appeal was clear. Prior to the 1993 amendments to Fed. R. App. P. 3(c), approximately half of the circuits had directly addressed this issue under facts virtually identical to the one before this Court in this appeal. The Fourth, Ninth, and Eleventh Circuits held that the appellate court had jurisdiction to hear the appeal under these circumstances. See, e.g., Miltier v. Downes, 935 F.2d 660 (4th Cir. 1991); Aetna Life Ins. Co., 855 F.2d 1470; and Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Associated Contractors, Inc., 877 F.2d 938 (11th Cir. 1989). However, the Second, Third and Seventh Circuits barred appeals on these facts. See, e.g. DeLuca v. Long Island Lighting Co., Inc., 862 F.2d 427 (2nd Cir. 1988); Collier v. Marshall, Dennehey, et al., 977 F.2d 93 (3rd Cir. 1992); and F.T.C., 894 F.2d 879.

The First Circuit, has rendered a range of rulings which do not appear to be consistent. Compare Gonzalez-Vega v. Hernandez-Colon, 866 F.2d 519 (1st Cir. 1989) (holding that there was no jurisdiction over appeal of party not named as an appellant even where the appellees are not misled) with In re Grand Jury Proceedings, 875 F.2d 927 (1st Cir. 1989) (holding that

jurisdiction over appeal is proper where the sanctioned attorney is not named as appellant, but appellees had notice that attorney intended to appeal).

The Fifth, Sixth, Eighth, and Tenth Circuits, applying Torres and Rule 3(c) to distinguishable facts, did not apply the rule restrictively to preclude appeals. See Pope v. Mississippi Real Estate Comm'n., 872 F.2d 127 (5th Cir. 1989) (use of "et al." gives notice of identity of appellants -- only two possible appellants); Ford v. Nicks, 866 F.2d 865 (6th Cir. 1989) (placing "the" before "defendants" gives notice that all defendants intended to appeal and thus jurisdiction over appeal is proper); Jeffers v. Clinton, 992 F.2d 826 (8th Cir. 1993) (where appellee sued government officials but only one official is specifically identified, jurisdiction over the appeals of all appellants proper); and Tri-Crown, Inc. v. Am. Fed. S&L Ass'n., 908 F.2d 578 (10th Cir. 1990) (appeal proper where appellant is named in caption but merely referenced in the body of the notice of appeal).

Judicial gloss interpreting 1993 amendments to Fed. R. App. P. 3(c) has eliminated some of the inconsistency. The circuit courts which have addressed this issue under virtually identical facts, since the 1993 amendments, have affirmed appellate jurisdiction. The Fifth Circuit now acknowledges that a virtually identical appeal should be allowed under the 1993 amendments. See Garcia v. Wash, 20 F.3d 608 (5th Cir. 1994) (holding that under the 1993 amendments, it had jurisdiction to hear the

appeal of a sanctioned attorney in a Bartel's type fact pattern). The Sixth Circuit, has allowed appeals so long as the appellees are "aware" of the party's intent to appeal. See Street v. City of Dearborn Heights, 1994 U.S. App. LEXIS 31330 (6th Cir. Nov. 4, 1994) (jurisdiction to hear a Bartel's type appeal of a sanctioned attorney). The Ninth Circuit has continued to allow the same result. See Crane v. Conoco, Inc. 1994 U.S. App. LEXIS 34175 (9th Cir. Dec. 2, 1994) (notice of appeal sufficient when taken in the name of an attorney's clients but specifies, inter alia, appeal from sanctions against the attorney since appellees "knew" that only the attorney had standing to appeal the sanctions order, the issue of the clients' standing to appeal the sanctions ordered against their attorney deemed irrelevant). The Seventh and Tenth Circuits, have ruled on similar facts and reached similar results. See Flaherty v. Gas Research Inst., 31 F.3d 451 (7th Cir. 1994) (noting that Torres was overruled by 1993 amendments to Rule 3(c) and that prior decisions dismissing appeals of sanctioned attorneys had been based on Torres); see also, Kemp v. Heuckendorf, 1995 U.S. App. LEXIS 7570 (10th Cir. April 4, 1995) (jurisdiction over appeal is proper where attorney inadvertently placed a different client's name on the notice of appeal).

Given the inconsistency and confusion among the circuits, this Court should take this opportunity to clarify this issue and allow the appeal.

III. The Purpose of Rule 3(c) Is to Provide Notice to the Court and Other Parties as to the Identity of the Party Taking the Appeal.

Fed. R. App. P. 3(c) does not preclude appellate jurisdiction merely because the intended appellant is not specifically identified as the appellant in the notice of appeal. Such an approach would be inconsistent with the purpose of the Federal Rules. As noted by the Second Circuit in DeLuca, 862 F.2d at 429, "[t]he purpose of the specificity requirement of Rule 3(c) is to provide notice both to the opposition and the court of the identity of the appellant or appellants." citing Torres, 108 S.Ct. at 2409. This analysis is noted and endorsed by the Fifth Circuit. In Britt v. The Grocers Supply Co., Inc. 978 F.2d 1441, 1444 (5th Cir. 1992), where the court noted that in determining the sufficiency of a notice of appeal, it looked to the purpose, to give notice, rather than the letter of Rule 3(c)'s specificity requirement.

In the present case, the Third Circuit and all parties had knowledge of Petitioner's intent to appeal. Petitioner was the only party having standing to appeal the specified sanctions order. Petitioner's name was set forth specifically as the attorney/party sanctioned. There was no possible ambiguity or confusion as to the party who intended to appeal; therefore the appeal should not be denied on ambiguities or intent grounds. See Miltier, 935 F.2d 660. To deny this appeal based on the wording of the notice of appeal was in direct contradiction and

contravention of the purpose of Rule 3(c).

The underlying purpose of Rule 3(c), to provide notice, has been relied upon in similar instances to obtain just results. In United States v. Musa, 946 F.2d 1297 (7th Cir. 1991), the appellant's notice of appeal incorrectly indicated the Eighth Circuit as the appellate court involved in the appeal. Rule 3(c) states that the notice must designate the court to which the appeal lies. Yet, the Seventh Circuit noted that "[c]entral to the Torres decision is the principle of fair notice to the opposition and the court." Id. at 1301. The court then held that it had jurisdiction to hear the appeal because the court and all parties had notice that the Seventh Circuit was the only possible appellate court. Thus, despite its generally strict adherence to Torres and Rule 3(c), even the Seventh Circuit has liberally interpreted other parts of the Rule to ensure just results under the notice requirements of the Federal Rules. This same analysis should apply to Rule 3(c) in its entirety.

A. The Conflicting and Inconsistent Circuit Decisions Denying Appeals Because of an Ostensible Jurisdictional Bar Ignore the Clear Purpose and Intent of the Federal Rules.

The First Circuit jurisprudence reflects the difficulties and inconsistencies of an overly technical approach. In Gonzalez-Vega, 866 F.2d 519, the First Circuit denied the appellants' right to appeal where the appellants were not named in the notice of appeal. In its

opinion, the First Circuit noted that "failure to name an appellant in the notice of appeal necessitates dismissal of an appeal, even if the appellee was not misled." Id. at 520. However, just three months later, that same court reached the opposite result. In In re Grand Jury Proceedings, 875 F.2d 927, an Assistant United States Attorney was personally held in contempt. The appeal of the contempt order was "improperly" filed on behalf of the United States of America. (Viz. The attorney was not named as the appellant.) However, the court found that it had jurisdiction over the appeal. The court framed the issue in terms of "whether the notice of appeal was sufficient to give fair notice that [the attorney himself] intended to appeal." Id. at 930. Citing Torres, the court then noted the purpose of Rule 3(c) to give notice to the court and all parties involved. The facts found controlling were as follows: the judgment was specified as the judgment of contempt entered against the attorney; the attorney was the only possible appellant; and the attorney had signed the notice.[7] Relying on these facts, the court found that notice was given and that the omission was merely an informality of form or title which should not lead to dismissal.

Yet, three years later the court reverted

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[7]These facts are identical to the facts in the case at bar. Petitioner's notice of appeal specifically identified that the sanction order was the order being appealed from. Additionally, he was the only party with standing to appeal that order. Petitioner had also signed the notice of appeal.

back to its original position. In D.C.P.B., Inc. v. City of Lebanon, 957 F.2d 913 (1st Cir. 1992), a sanctioned attorney appealed in the name of his clients. The court held that the appeal was barred because he was not named as an appellant in the notice of appeal. The inconsistency between these three cases within the First Circuit defies analysis and interpretive application since they all rely on Torres.

The Third Circuit also reaches inconsistent results. The court has considered facts virtually identical to the case at bar. In Collier, 977 F.2d at 95, the court held that "when sanctions are imposed only upon the attorney and the notice of appeal is in the name of the clients alone, we are jurisdictionally barred from considering an appeal of the order imposing sanctions against the attorney." The Circuit noted that the interests of the parties (the attorney and the client) are different.

Yet, just six months later, the Third Circuit rendered a decision facially inconsistent with the reasoning in Collier. In United States v. Jones, 994 F.2d 1051 (3rd Cir. 1993), the appellant, the United States Attorney, incorrectly identified the Government of the Virgin Islands as the appellant in the notice of appeal. However, the United States was the appellant. In holding that the appeal should not be dismissed despite the misidentification of the appellant, the court noted that the circumstances surrounding the appeal gave notice of the identity of the appellant. Such reasoning appears to support

the allowance of the appeal in this case, but the circuit declined to proceed on jurisdictional grounds.

B. Barring Appeals on these Facts Would Be Unjust.

The United States Court of Appeals for the D.C. Circuit has acknowledged the unfairness in dismissing an appeal based on facts such as those before this Court. In District of Columbia Nurses' Ass'n. v. D.C., 854 F.2d 1448 (D.C. Cir. 1988), the issue arose from the use of "et al." in the notice of appeal. The court declined to exercise appellate jurisdiction. In a concurring opinion, Circuit Judge Mikva, referencing the Federal Rules, noted the harshness and unfairness of the dismissal of the appeal, as he thought mandated by Torres. Judge Mikva observed:

> Plaintiffs' appeal on the merits of their case will not be heard simply because their notice of appeal failed to specify all their names - even though there has been no surprise, detrimental reliance, or undue prejudice to the appellee. I cannot believe this is consistent with the intent of the Federal rules to "secure the just, speedy, and inexpensive determination of every action. "Fed.R.Civ.P. 1. It would appear that we are back to the bad old days of the snares and tricks that would befall an inartful pleader at the common law. The advent of the Federal Rules of Civil Procedure, as the title implies, was supposed to civilized the process and look to fairness rather than technicalities.

Interpreting Torres and Rule 3(c) to dismiss appeals under such circumstances is an unfair technicality in contradiction to the letter, spirit, and purpose of the Federal Rules. This Court should adopt that analysis and not lend its imprimatur to an unjust - "snares and tricks . . ." - interpretation of amended Rule 3(c).

IV. The 1993 Amendments to Fed. R. App. P. 3(c) Mandate that this Appeal Be Allowed.

This Court should hold that Rule 3(c), as amended in 1993, allows for this appeal. The 1993 amendments to Fed. R. App. P. 3(c) have significantly changed Rule 3(c) jurisprudence and appear to reflect a congressional response to this Court's ruling in Torres. Many courts have viewed the 1993 amendments as effectively overruling Torres. See Garcia, 20 F.3d 608. The substantial changes and additions to the rule show an apparent congressional intent to relax any arbitrary specificity requirement under Rule 3(c).

A. The 1993 Amendments to Fed. R. App. P. 3(c) Evidence a Clear Congressional Intent to Overrule Torres and to Prevent the Mechanical Use of Rule 3(c) to Bar Otherwise Legitimate Appeals.

The current version of Federal Rule of Appellate Procedure 3(c) reflects a substantial change from the former version. Amended Rule 3(c) provides:

> (c) CONTENT OF THE NOTICE OF APPEAL. . . . An appeal will not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice. (emphasis added)

When comparing the amended rule with the prior version, it can be seen that the current rule is much more detailed and more broadly favors legitimate appeals. The amended rule specifically identifies exceptions to the former specificity requirement. For example, it allows for an attorney who represents more than one appellant to utilize the phrase "et al." This was absolutely prohibited under Torres. More importantly, the last sentence has been changed in the current version of Rule 3(c). The 1993 amendments added a phrase to the last sentence of the rule "...or for failure to name a party whose intent to appeal is otherwise clear from the notice." This language also seems to address the confusion resulting from Torres. It clearly mandates allowance of Petitioner's appeal, where the intent to appeal was unambiguously clear from the notice of appeal.

The Advisory Committee's Notes of 1993 should be viewed as persuasive. These notes acknowledge the amendments' purpose to reduce the amount of satellite litigation "spawned" from this Court's decision in Torres. The notes also acknowledge the importance of the right to appeal and indicate that the amendment is designed to prevent the loss of the right to appeal through the inadvertent omission of a party's name on the notice of appeal. The notes

indicate that the amendments were designed to prevent the inadvertent loss of the right to appeal under facts such as before this court.

Another important aspect of the Advisory Committee's Notes is that it annunciates a test for the sufficiency of a notice of appeal. This test is "whether it is objectively clear that a party intended to appeal." Fed. R. App. P. 3(c) Advisory Committee's Notes of 1993. Applying this test to the present case, it is objectively clear that Petitioner intended to appeal the sanctions order identified in the notice of appeal. [8] Most importantly, the Advisory Committee's Notes emphasizes that the rule makes it clear that dismissal of an appeal should not occur when it is otherwise clear from the notice that the party intended to appeal. If a court determines that it is objectively clear that a party intended to appeal, there are neither administrative concerns nor fairness concerns that should prevent the appeal from going forward. Fed. R. App. P. 3(c) Advisory Committee's Notes of 1993.

The Third Circuit's reliance upon Bartels v. Sports Arena Employee Local 137, 838 F.2d 101 (3rd. Cir. 1988) mischaracterized the issue; it also failed to adhere to Rule 3(c) as amended when it barred Petitioner's appeal.[9] Despite

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[8]As mentioned previously, the order being appealed from was specified as the sanction order. Petitioner was the only party with standing to appeal that order. Additionally, Petitioner had signed the notice of appeal.

[9]The issue was not whether the Boykins had standing to appeal the sanction order, but rather was whether jurisdiction could be exercised over

the plain and obvious intent to appeal, the Third Circuit denied the appeal through its jurisdictional panel.

B. This Court Should Adhere to the Interpretation of Amended Rule 3(c) as Presently Given by the Circuit Courts.

Since the 1993 amendments the appellate courts, except for the Third Circuit, have allowed similar appeals to proceed.

In Garcia, 20 F.3d 608 (5th Cir. 1995), the plaintiff's attorney was sanctioned under Rule 11. The attorney had appealed in the name of his clients, instead of in his own name. The court noted that under Torres and the prior Rule 3(c), it would not have had jurisdiction to hear the appeal, but found that it now had jurisdiction to hear the attorney's appeal.

The Sixth Circuit in Street, 1994 U.S. App. LEXIS 31330, sustained an appeal where the plaintiff's attorneys attempted to appeal an order imposing sanctions. However, the notice of appeal named the client/plaintiff as the appellant. The court noted that:

> [w]hen it is readily apparent to the appellees from the notice of appeal that plaintiff's attorneys are attempting to appeal an order issued against them, it would be an exaltation of form over substance to deprive this court of jurisdiction because the attorneys' names do not

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Petitioner's appeal when he was not identified as the appellant in the caption of the notice of appeal.

> appear in addition to the client in the formal caption or body of the notice.

Id. at *19.

The Seventh Circuit has altered its strict application of the specificity requirement. In Flaherty, 31 F.3d 451, an attorney appealed in the name of his clients instead of in his own name. The court noted that its prior decisions, dismissing appeals under these facts, were based on Torres, but Torres was effectively overruled by the 1993 amendments to Rule 3(c).

The Ninth Circuit, under amended Rule 3(c), continues to hold that an attorney's appeal from sanctions should not be barred because the appeal was brought in the name of the attorney's clients. Chavez v. City of Lynwood, 1994 U.S. App. LEXIS 34565 (9th Cir. Nov. 22, 1994), allowed such an appeal based on amended Rule 3(c). See also, Ortaliza v. General Mills, 1995 U.S. App. LEXIS 12791 (9th Cir. May 24, 1995). Once it is determined that it is objectively clear that a party intended to appeal, there are no administrative or fairness concerns which should prevent the appeal. The court noted amended Rule 3(c) requires an assessment of the opportunity for confusion or prejudice which did not exist. Id. See also, the Ninth Circuit decision in Crane, 1994 U.S. App. LEXIS 34175, involving multiple parties. As in that case, Petitioner should likewise not be prevented from appealing.

Amended Rule 3(c) has been similarly applied by the Tenth Circuit. In Kemp, 1995 U.S. App. LEXIS 7570, the plaintiff's attorney

accidentally placed a different client's name on the notice of appeal. Applying amended Rule 3(c), the court held that notice was still adequate -- the plaintiff was the only person who could have appealed the specified judgment.

Finally, the Third Circuit has, since the 1993 amendments to Rule 3(c), apparently only considered one case -- the case at bar now being appealed. The Third Circuit refused to allow an appeal under facts identical to those before the previously cited circuit courts that allowed the appeals to proceed. This Court needs to resolve this conflict among the circuits.

CONCLUSION

For the reasons propounded in this petition, this Honorable Court should issue a Writ of Certiorari in this case.

Respectfully Submitted,

Robert S. Mirin, Esq.
Pro Se Petitioner
8150 Derry St.
Harrisburg, PA 17111-5260
(717) 561-1515

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

April 4, 1995
A-84

No. 95-7096
MICHAEL R. BOYKIN, et al.
v.
BLOOMSBURG UNIVERSITY OF PENNSYLVANIA, et al.
MICHAEL R. BOYKIN, et al., Appellants
(M.D. (Scranton) of Pa. Civil.
No. 94-cv-00306 (MM))

Present: BECKER, HUTCHINSON and ALITO, Circuit Judges.

Clerk's submission for possible dismissal due to jurisdictional defect.

Anthony Infante 597-3137
Deputy Clerk

Appellants' Brief & Appendix due 5/1/95.

O R D E R

The foregoing appeal is dismissed for lack of appellate jurisdiction as appellants lack standing to appeal the district court's imposition of sanctions personally on their attorney. Bartels v. Sports Arena Employee Local 137, 838 F.2d 101 (3d Cir. 1988)

By the Court,

Circuit Judge

Date: APR 27 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MICHAEL R. BOYKIN, et al.,	:	
Plaintiffs	:	No. 4:CV-94-306
v.	:	Complaint Filed 3/2/94
BLOOMSBURG UNIVERSITY OF PENNSYLVANIA, et al.,	:	(Judge Muir)
Defendants	:	

OPINION
January 19, 1995

I. Introduction

This order relates to a motion for sanctions against Robert S. Mirin, counsel for the Plaintiffs, filed by Defendants Press-Enterprise, Inc. and Paul Eyerly, III, publisher of Press-Enterprise ("media defendants").

A hearing on the motion commenced Friday, October 21, 1994. Mr. Mirin was the sole witness the entire day. During the day the Court stated that Mr. Mirin's answers were extremely lengthy, that the proceedings were moving slowly, and that if

the hearing was not terminated by 4:15 p.m. on the 6th hearing day, the Court would terminate it at that time. The earing concluded on the sixth hearing day, October 28, 1994, at 4:12 p.m.

During the last day of the hearing, the Court set filing dates for proposed supplemental findings of fact, objections and briefing.

At the conclusion of the hearing, the Court made oral findings of fact and stated oral conclusions of law, reserving the right to supplement the same after consideration of the above-scheduled filings. those oral findings and conclusions are embodied in our order of October 30, 1994, and are interspersed within our findings of fact set forth below.

On November 7, 1994, the media defendants filed proposed supplemental findings of fact and a supplemental submission and affidavit in support

thereof. On November 14, 1994, Mr. Mirin filed objections to the media defendants' proposed supplemental findings of fact. On November 18, 1994, the media defendants filed a brief in opposition to Mirin's objections. No reply brief was filed.

On December 9, 1994, at the request of Mr. Mirin, we held a second hearing to address the proposed supplemental findings of fact submitted by the Media Defendants on November 7, 1994. The hearing concluded at 4:30 p.m. on December 9, 1994.

At the conclusion of the hearing, we established a filing deadline of December 23, 1994, for the submission of additional proposed findings of fact and conclusions of law with respect to the issues raised at the second hearing. On December 13, 1994, we issued an order in which reduced our oral order of December 9, 1994 to writing and also allowed for the submission of additional proposed supplemental findings of fact and conclusions of law with respect

to the first hearing.

On December 21, 1994, we granted Mr. Mirin's motion for an extension of time to file his additional proposed supplemental findings of fact and conclusions of law. On December 23, 1994, the media defendants filed their additional proposed supplemental findings of fact and conclusions of law. On December 30, 1994, Mr. Mirin filed his additional proposed findings of fact and conclusions of law. This matter is ripe for disposition. The following are the Court's findings of fact, discussion, and conclusions of law with regard to the issues raised.

II. Findings of Fact.

1. Plaintiffs in the above action are Michael R. Boykin, Margaret L. Boykin and Aaron M. Boykin, all individuals residing at 203 Glenn Avenue, Bloomsburg, Pennsylvania. (Undisputed, hereinafter "U")

2. Counsel for Plaintiffs in the

above action is Robert S. Mirin, Esquire, of Mirin & Jacobson, P.C. 8150 Derry Street, Harrisburg, PA 17111-5260. (U)

3. Plaintiffs commenced an action in state court on January 11, 1994, by filing a Praecipe for Writ of Summons in the Court of Common Pleas of Columbia county, Pennsylvania, C.A. No. 31-1994. (U)

4. Writs were issued in plaintiffs' state court suit to Bloomsburg University and eight other Bloomsburg related officials and individuals (hereinafter "the Bloomsburg defendants"), along with several Pennsylvania state troopers and other state actors.

5. Paul Eyerly, III (hereinafter "Eyerly"), the publisher of the Press-Enterprise, also was named as defendants in plaintiffs' state court action.

6. Press-Enterprise, Inc. (hereinafter Press-Enterprise") publishes the Press-Enterprise, a newspaper of general circulation in Bloomsburg,

Pennsylvania and surrounding areas. (U)

7. Eyerly and Press Enterprise, Inc. are hereinafter referred to as the "media defendants."

8. On January 24, 1994, defendant Eyerly praeciped the Court for a Rule directing plaintiffs to file a Complaint against him in the state court action. (U)

9. On January 24, 1994, the Columbia County Prothonotary executed the Rule, ordering plaintiffs to a Complaint against Eyerly within 20 days after service of the rule. (U)

10. On February 8, 1994, counsel for defendant Eyerly served plaintiffs by placement in first-class U.S. Mail on that date with the Rule from the Columbia County Prothonotary.

11. Plaintiffs did not file a Complaint with the Columbia County Prothonotary by March 2, 1994, as directed by the Rule issued by the Court of Common Pleas.

12. On March 2, 1994, defendant Eyerly praeciped the Court to enter a Judgment of Non Pros against plaintiffs for failing to comply with the state court Rule. (U)

13. On March 2, 1994, the Prothonotary of the Court of Common Pleas of Columbia County entered an Order granting a Judgment of Non Pros against plaintiffs, thereby dismissing Eyerly as a defendant from the action. (U)

14. On March 2, 1994, plaintiffs initiated the instance action by filing a Complaint in the Middle District of Pennsylvania, No. 4:CV-94-306 ("Boykin I"), naming several other defendants, including Eyerly and the Press-Enterprise. (U)

15. The parties have continuously referred in their papers and in their testimony to the action filed in this Court on March 2, 1994, as Boykin I and the action instituted January 11, 1994, in the Court of Common Pleas of Columbia County and removed to this Court on May 31, 1994,

as Boykin II. (Because of the use of these designations in undisputed facts, we will retain those designations despite the confusion obviously engendered).

16. In Boykin I, plaintiffs alleged that the publication of certain unidentified news articles by the Press-Enterprise violated the federal civil rights laws, including sections 1981, 1983, 1985 and 1986 of Title 42, as well as violated Title VII.

17. In their Boykin I federal court Complaint, plaintiffs also alleged state law claims against the media defendants, including defamation and invasion of privacy. (U)

18. The civil rights claims and pendent libel and invasion of privacy allegations in the Boykin I federal complaint were of a general nature, and no newspaper articles were identified in the complaint.

19. No newspaper articles were

physically attached as exhibits in the Boykin I federal Complaint. (U)

20. On March 31, 1994, the media defendants filed a Motion to Dismiss plaintiffs' Complaint with this Court. (U)

21. In the Motion to Dismiss, the media defendants argued, among other things, that plaintiffs' state law libel and privacy claims were time barred under the applicable one year statute of limitations and that plaintiffs' libel and privacy claims were legally insufficient. (U)

22. As of March 23, 1994, plaintiff's counsel was put on notice that the media defendants contended that plaintiffs' state law libel and privacy claims were time-barred under the applicable one year statute of limitations.

23. After the media defendants agreed to give plaintiffs a ten day extension to respond, on April 18, 1994, plaintiffs filed their brief in opposition to the

motion to dismiss. (U)

24. On April 20, 1994, in the earlier state court action initiated by Writ of Summons, the Bloomsburg University defendants, by the Commonwealth attorney, praeciped the Columbia County Prothonotary to Rule plaintiffs to file a Complaint as to the Bloomsburg defendants or suffer a Judgment of Non Pros. (U)

25. On April 20, 1994, the Columbia County Prothonotary issued a Rule to plaintiffs ordering them to file a Complaint with respect to the Bloomsburg defendants within 20 days after service of the Rule. (U)

26. In response to the Rule, plaintiffs filed a Complaint ("Boykin II") in the Columbia County state court action, No. 31-1994, on or about May 9, 1994. (U)

27. In this state complaint which is virtually identical to the federal complaint in Boykin I, in addition to naming the Bloomsburg defendants and

several other state actors, plaintiffs also identified the Press-Enterprise as a defendant for the first time.

28. The state court Rule issued on April 20, 1994, did not require plaintiffs to file a complaint as to the media defendants.

29. Plaintiffs also named Paul Eyerly, III, as publisher, as a defendant in this Complaint, despite that when the Complaint was filed, the prior March 2, 1994 Order non prossing plaintiffs as to defendant Eyerly and dismissing Eyerly from the action remained a valid, standing Order. (U)

30. Plaintiff's Boykin II Complaint was virtually identical to the previous Boykin I Complaint filed in the Middle District of Pennsylvania. (U)

31. The Boykin I and Boykin II Complaints allege identical claims of defamation and invasion of privacy against the media defendants. (U)

32. No newspaper articles were identified in the body of the Boykin II Complaint.

33. No newspaper articles were attached as exhibits to the Boykin II Complaint.

34. On May 16, 1994, counsel for the media defendants wrote to plaintiffs' counsel, Robert S. Mirin, Esquire, informing him that in defense counsel's view plaintiffs had engaged in procedural maneuvers calling in question their "good faith." (U)

35. The media defendants contend that their May 16, 1994 letter to plaintiffs' counsel put him on notice that the media defendants intended to seek counsel fees and sanctions, if plaintiffs would not dismiss their claims against the media defendants in Boykin II. (U)

36. On May 17, 1994, this Court dismissed all claims against the media defendants in Boykin I. (U)

37. The Court's May 17, 1994 Memorandum stated that plaintiffs' libel and privacy claims against the media defendants were barred by the applicable one-year statute of limitations. (U)

38. The Court's May 17, 1994 Memorandum stated that plaintiffs' libel and privacy claims against the media defendants "failed to meet the most basic pleading requirements" and that the Complaint failed to allege the necessary elements to sustain such claims. (U)

39. The Court's May 17, 1994 Memorandum stated that plaintiffs' federal civil rights claims under §§ 1985 and 1986 "were devoid of merit" and that plaintiffs failed to allege sustainable claims against the media defendants. (U)

40. The Court's May 17, 1994 Memorandum stated that plaintiffs Complaint failed to allege sustainable § 1981 or § 1983 claims as to the media defendants. (U)

41. On May 31, 1994, the Bloomsburg defendants successfully petitioned the Court to remove the state court Boykin II Complaint to the Middle District of Pennsylvania, No. 4:CV-94-817, at which time plaintiff's Motion to Strike the Judgment of Non Pros was pending. (U)

42. On June 1, 1994, plaintiffs filed an Application for Reconsideration of the federal Court's May 17, 1994 Order and Memorandum, dismissing all claims against the media defendants in the Boykin I Complaint. (U)

43. Prior to filing a 12(b)(6) Motion with respect to the Boykin II Complaint, pursuant to Middle District Rule 7.1, the media defendants contacted the offices of plaintiffs' counsel to ask that he withdraw his claims voluntarily against Eyerly and the Press-Enterprise, but plaintiff's counsel was unavailable. (U)

44. On June 7, 1994, the media defendants were required under the Federal

Rules to file either a responsive pleading or a 12(b) Motion to Dismiss with respect to the removed Boykin II Complaint. (U)

45. On June 7, 1994, the media defendants filed a 12(b)(6) Motion to Dismiss Plaintiffs' Boykin II Complaint on the grounds that: (a) plaintiffs' claims against the media defendants were identical to the claims previously dismissed on their merits by this Court; (b) plaintiffs' state law libel and privacy claims were time barred under the applicable one year statute of limitations and were legally insufficient; and (c) plaintiff failed to state a claim for a federal civil rights violation. (U)

46. The media defendants subsequently contacted plaintiffs' counsel again to seek his concurrence to the motion to dismiss filed in Boykin II, and plaintiffs' counsel agreed to dismiss the claims against Eyerly only. (U)

47. On June 15, 1994, the Court

ordered Boykin I and Boykin II to be consolidated under Civil Action No. 4:CV-94-306. (U)

48. On June 30, 1994, plaintiffs filed a Brief in Support of Plaintiffs' Motion for Reconsideration.

49. In plaintiffs' Brief in Support of Plaintiffs' Motion for Reconsideration, plaintiffs admitted that their state law libel and invasion of privacy claims were barred by the applicable statute of limitations. Further, plaintiffs also admitted with respect to this same issue that "the law of Pennsylvania is against them." Brief in Support at 2.

50. In plaintiffs' Brief in Support of Plaintiffs' Motion for Reconsideration, plaintiffs' argument as to the reason why the Court should reconsider its decision with respect to plaintiffs' libel and privacy claims is "that the law of Pennsylvania is unjust and should be changed." Brief in Support at 2.

51. On July 18, 1994, this Court denied plaintiffs' Motion for Reconsideration with respect to the above matter. (U)

52. In the Court's July 18, 1994 Order, it held that the media defendants' motion to dismiss the Boykin II Complaint was deemed to be moot because the two cases had been consolidated. "U"

53. In a previous state court action filed in Columbia County, Pennsylvania, not including the Boykins, plaintiffs' counsel, Robert S. Mirin, Esquire, filed a suit on November 11, 1993, on behalf of plaintiff, George Mitchell. (U)

54. As was the case in Boykin, the Complaint filed in Mitchell named multiple defendants and asserted federal civil rights violations and pendent state claims. (U)

55. The Mitchell complaint, inter alia, also asserted libel and invasion of privacy claims against

defendant Press Enterprise, Inc. (U)

56. The Complaint filed in Mitchell v. Bloomsburg Univ. of Pa., et al., No. 1674-93, was removed to the Middle District of Pennsylvania on December 3, 1993, and is presently in discovery. (U)

57. Three of the articles attached to the Complaint were published more than one year before plaintiff initiated suit in Mitchell. (U)

58. On December 9, 1993, Press-Enterprise filed a Motion to Dismiss all claims against it in the Mitchell action. (U)

59. In its Motion to Dismiss, Press-Enterprise put plaintiff on notice of its contention that three of the articles on which its defamation and invasion of privacy claims were based were time barred by the statute of limitations and that these claims were legally deficient.

60. Plaintiff was also put on notice in this same Motion to Dismiss that one of

the articles upon which plaintiff's defamation and invasion of privacy claims were based was not published by the Press-Enterprise. (U)

61. On January 14, 1994, in lieu of responding to the Press-Enterprise's 12(b)(6) Motion to Dismiss, plaintiff Mitchell filed an Amended Complaint. (U)

62. In the Amended Complaint filed in Mitchell, plaintiff's counsel deleted plaintiff's libel claims, but continued to assert claims for invasion of privacy against the Press-Enterprise. (U)

63. One of the articles attached to the Amended Complaint filed in Mitchell, entitled "President responds to issues," was not published by the Press-Enterprise. (U)

64. On March 4, 1994, defendant Press-Enterprise filed a Motion to Dismiss Plaintiff's Amended Complaint in Mithcell. (U)

65. In this second Motion to Dismiss,

the Press-Enterprise again put plaintiff on notice of its contention that three of the articles on which its invasion of privacy claims were based were time barred by the statute of limitations and that their claim with respect to the remaining article was legally deficient. (U)

66. On April 15, 1994, the Honorable James F. McClure, Jr., United States District Judge for the Middle District of Pennsylvania, issued a Memorandum Opinion in Mitchell granting the Press-Enterprise's 12(b)(6) Motion to Dismiss, dismissing all claims against the Press-Enterprise with prejudice. (U)

67. Judge McClure's April 15, 1994 Memorandum Opinion stated that four of the articles on which plaintiff's invasion of privacy claims were based were published more than one year prior to plaintiff's commencement of the Mitchell action. (U).

68. Judge McClure's April 15, 1994 Memorandum Opinion stated that four of the

articles on which plaintiff's invasion of privacy claims were based were barred by the statute of limitations. (U)

69. Judge McClure's April 15, 1994 Memorandum Opinion stated that plaintiffs' claims on the only remaining article that was not time-barred, could not reasonably be read to portray plaintiff in a false light. (U)

70. Pursuant to Paragraph 2 of this Court's Order No. 1 of March 2, 1994, it was plaintiffs' counsel's obligation to arrange an attorneys' conference to discuss and submit a Case Management Plan.

71. Pursuant to Paragraph 1 of this Court's Order No. 2 of March 4, 1994, the date set for a case management conference with the Court was June 30, 1994.

72. On June 8, 1994, the Court advanced the case management conference to 9:00 a.m. on June 29, 1994.

73. On June 8, 1994, Plaintiff moved to extend the time to file the case

management plain to July 1, 1994, and to hold the case management conference on July 8, 1994, which motion was granted by Order of June 27, 1994.

74. On July 7, 1994, the day before the scheduled case management conference, plaintiffs' counsel filed in Harrisburg a motion for a continuance of the case management conference which was denied.

75. The case management conference was held at 4:00 p.m. on July 8, 1994.

76. Despite plaintiffs' counsel being given an extension of time to arrange an attorneys' conference to discuss and prepare a Case Management Plan, none was arranged by plaintiffs' counsel.

77. Plaintiffs' counsel failed to fulfill his obligation to arrange an attorneys' conference to discuss the Case Management Plan.

78. Plaintiffs' counsel failed to participate in preparing the Case Management Plan filed in the above

captioned matter.

79. Counsel for plaintiffs, Robert S. Mirin, Esquire, did not have in his possession any articles, claimed to be false and defamatory, at the time he filed the Boykin I Complaint on March 2, 1994.

80. Counsel for plaintiffs, Robert S. Mirin, Esquire, did not have in his possession any articles, claimed to be false and defamatory, at the he filed the Boykin II Complaint on May 9, 1994.

81. Counsel for plaintiffs, Robert S. Mirin, Esquire, did not have in his possession any articles, claimed to be false and defamatory, at the time he refused to dismiss the Boykin II Complaint on May 17, 1994.

82. Counsel for plaintiffs, Robert S. Mirin, Esquire, was unable to identify a single Press-Enterprise article in his possession at the time he instituted the Boykin I or Boykin II actions.

83. Counsel for plaintiffs, Robert S.

Mirin, Esquire, refused to dismiss the Boykin II Complaint filed on May 9, 1994, although he recognized that he was proposing three novel legal theories for which he could advance no existing legal precedent or legal support.

84. Counsel for plaintiffs, Robert S. Mirin, Esquire, refused to dismiss the Boykin II Complaint although he recognized that he was proposing three novel legal theories already rejected by the undersigned judge in Boykin I.

85. Counsel for Plaintiffs, Robert S. Mirin, Esq., proposed to change Pennsylvania law to reflect that the statute of limitations on a claim for defamation should run from the date of discovery of the offending language by plaintiff rather than from the date of publication.

86. Counsel for Plaintiffs, Robert S. Mirin, Esq., proposed to change Pennsylvania's law regarding the media's

privilege to republish fairly and accurately the official disseminations of public officials at official press conferences.

87. Counsel for Plaintiffs, Robert S. Mirin, Esq., proposed to create law to the effect that the media could be held accountable for violations of a criminal defendant's civil rights if it, through lack of reasonable diligence, failed to uncover and publish facts favorable to the defendant.

88. The legal theories enunciated above by plaintiffs' counsel were pursued in bad faith.

89. The legal theories enunciated above by plaintiffs' counsel were maintained in bad faith.

90. Robert S. Mirin's clients would in no way have been prejudiced by dismissal of the Boykin II Complaint as it presented issues identical to those raised in the Boykin I Complaint.

91. Robert S. Mirin's grossly evasive answers to questions while on the stand on October 21, 1994, and October 24, 1994, were unconscionable and delayed these proceedings unreasonably.

92. Some of Robert S. Mirin's answers to questions posed by counsel for the media defendants and the Court were deceptive.

93. Some of Robert S. Mirin's explanation for his conduct in this litigation lacks credibility.

94. Robert S. Mirin's filing of a suit against Paul Eyerly, III, in Boykin II was in bad faith, vexatious, and harassing.

95. The failure of Robert S. Mirin to dismiss Press-Enterprise from Boykin II on May 17, 1994 was without basis, and was vexatious, harassing and in bad faith.

96. Robert S. Mirin's refusal to dismiss the Boykin II Complaint as to the Press-Enterprise on May 17, 1994 and thereafter, in the face of this Court's Order of May 17, 1994, and Mr. Mirin's

admission that he could not point to a specific Press-Enterprise article in his possession claimed to be false and defamatory was in bad faith, harassing, and vexatious.

97. Robert S. Mirin's refusal to dismiss the Boykin II Complaint as to the Press-Enterprise on May 17, 1994 and thereafter, in the face of this Court's Order of May 17, 1994 and Mr. Mirin's admission that he could not point to a single specific act in furtherance of the claimed conspiracy on the part of Press-Enterprise was in bad faith, harassing, and vexatious.

98. Plaintiffs' counsel, Robert S. Mirin, Esquire, failed to comply with this Court's Order No. 1 of March 4, 1994.

99. Robert S. Mirin, Esquire, failed to contact all defense counsel at least 15 days prior to the case management conference and to propose three alternative dates for a pre-case management conference

between counsel was in violation of this Court's March 4, 1994 Order No. 1.

100. Plaintiffs' counsel failed to disclose witnesses as required by said Order.

101. Plaintiffs' counsel failed to disclose documents as required by said Order.

102. Robert S. Mirin's failure to attempt to schedule a pre-case management conference between counsel was in violation of Order No. 1 of March 4, 1994, frustrated the orderly resolution of this case, and placed an unusual burden on other counsel.

103. Robert S. Mirin's failure to comply with the requirements of Order No. 2 of March 4, 1994, frustrated the process for preparation of a statement of undisputed facts and created an extra burden on opposing counsel.

104. Robert S. Mirin, Esquire has acted in the matters which are the subject of this proceeding in willful bad faith.

105. Robert S. Mirin, Esquire, acted without proper regard for the rights of defendants Eyerly and the Press-Enterprise.

106. Robert S. Mirin, Esquire, flagrantly, and without justification, violated the orders of this Court.

107. Samuel E. Klein, counsel for the media defendants, is a graduate of Temple University and Temple University School of Law, having received a J.D. degree in 1971.

108. Following graduation from law school, Samuel E. Klein served as a law clerk for the Honorable Charles R. Weiner of the United States District Court for the Eastern District of Pennsylvania.

109. From 1972 to 1992, Samuel E. Klein was employed by the law firm known in 1992 as Kohn, Klein, Nast & Graf, P.C., of Philadelphia.

110. In 1992, Samuel E. Klein joined the firm of Dechert Price & Rhoads as a partner.

111. Samuel E. Klein has represented

various news media clients in the defense of defamation and privacy cases throughout his 23 years at the Bar.

112. In addition to the media defendants herein, Samuel E. Klein has represented The Philadelphia Inquirer, The Philadelphia Daily News, Capital Cities/ABC, Inc., CBS, Inc., News America Corporation, Fox Broadcasting, Newsweek, Inc., the Associated Press, and many other clients in the defense of defamation and privacy actions.

113. Samuel E. Klein is the author of The Media Survival Kit, now in its fourth edition, which is a book for working journalists distributed to reporters and editors throughout Pennsylvania.

114. Samuel E. Klein is the Pennsylvania reporter for The Libel Defense Resource Center and The Reporters Committee for Freedom of the Press and has written chapters on Pennsylvania law for inclusion in their publications.

115. Samuel E. Klein has been recognized and is listed in Who's Who in America (49th ed. 1995) and in Naifeh and Smith, Best Lawyers in America (1993-1994).

116. Samuel E. Klein possesses extensive experience and special expertise in the defense of defamation and privacy actions.

117. Samuel E. Klein represents and has represented clients (other than the media defendants herein) in the Middle District of Pennsylvania in the defense of defamation and privacy actions.

118. Specifically, Samuel E. Klein regularly represents The Wilkes-Barre Times Leader and The Bedford Gazette in the defense of defamation and privacy actions; he also represents WHP-TV in Harrisburg and has represented The York Daily Record and Susquehanna Broadcasting Corporation.

119. Samuel E. Klein has represented other publishers throughout Pennsylvania, including the New-Castle News, The

Meyersdale Republication, and The Elk County Register.

120. In all of his representation, including the representation of other clients in the Middle District of Pennsylvania, Samuel E. Klein charges and is paid his regularly hourly rate which is presently $310 per hour.

121. The rate charged by Samuel E. Klein is the rate actually paid by the media defendants herein for work done through September 30, 1994, and is the rate charged but presently unpaid for work done since September 30, 1994.

122. Samuel E. Klein's hourly rate is comparable to rates of other attorneys in Philadelphia with reasonably comparable skill, similar experience, and reputation.

123. The hourly rates of Dechert Price & Rhoads are comparable to the rates charged by other large Philadelphia law firms, and are in line with those in the Philadelphia area for attorneys of

reasonably comparable skill, experience and reputation.

124. The hourly rates of Dechert Price & Rhoads are in the upper range of rates charged by large Philadelphia law firms but are not the highest.

125. The prevailing rates for experienced federal court litigators in the Williamsport area range from $100 to $150 per hour.

126. The rates regularly charged by John M. Humphrey, Esq., an experienced litigator with more than 20 years of litigation experiences, who practices in the Williamsport area, are $150 per hour for partners and approximately $125 per hour for associates in his firm, depending on experience.

127. Businesses in the Williamsport, Pennsylvania areas frequently seek specialized counsel from larger metropolitan areas when faced with litigation requiring special attorney

expertise.

128. Defense of a defamation or privacy action is the type of matter that local businesses may be expected to seek counsel with special expertise and experience in this field from outside of the Williamsport, Pennsylvania area.

129. There is no attorney in the Williamsport, Pennsylvania area with special expertise in the defense of defamation and privacy actions or who has special experience in that field of which the Court is aware.

130. The media defendants had sufficient reason and were justified in retaining Philadelphia counsel with special expertise and extensive experience in the defense of defamation and privacy actions to defend adequately their interests in the underlying litigation.

131. There are no comparable rates in the Williamsport, Pennsylvania area for attorneys with reasonably comparable skill,

experience, and expertise in the defense of defamation and privacy actions.

132. When local businesses seeking special expertise retain counsel from outside the Williamsport, Pennsylvania area, they expect to and do pay the normal hourly rates of the retained counsel.

133. It is fair, reasonable and appropriate to utilize the regularly hourly rates of Dechert Price & Rhoads in the Philadelphia area in this action for the purposes of determining the lodestar in this sanctions motion.

134. Samuel E. Klein's representation of the media defendants herein was of the highest quality and consistent with his expertise.

135. Samuel E. Klein's hourly rate of $310 per hour, in the light of his experience and expertise, is fair and reasonable.

136. Samuel E. Klein expended a total of 15 hours in representing the media

defendants from May 17, 1994 through September 30, 1994, as follows:

May, 1994	1.40 hours	(Ex. D15 and Ex. D21, page 2)
June, 1994	7.40 hours	(Ex. D16 and Ex. D21, page 3)
July/ August, 1994	4.70 hours	(Ex. D17 and Ex. D21, page 4)
September, 1994	1.50 hours	(Ex. D18 and Ex. D21, page 5)
	15.00 hours	

137. The 15 hours expended by Samuel E. Klein was reasonable and necessary for the defense of the action.

138. The time expended by Samuel E. Klein was necessitated by the bad faith conduct of Robert S. Mirin, and represents the excess attorneys' time spent by Mr. Klein as a result of the sanctionable conduct of Mr. Mirin.

139. Samuel E. Klein expended a total of 64.70 hours during the month of October, 1994 in preparation for and the presentation of the media defendants' Motion for Sanctions (Ex. D40, page 4).

140. Robert S. Mirin's lengthy and unresponsive answers to questions posed to him during the sanctions hearing unreasonably delayed the proceedings.

141. Robert S. Mirin's constant, repeated and flagrant interruption of the Court, despite repeated warnings from the Court, unreasonably delayed the sanctions hearing.

142. Robert S. Mirin's failure to present exhibits in accordance with the procedures of Order No. 2 of March 4, 1994 caused repeated confusion during the sanctions hearing and unreasonably delayed the proceedings.

143. Robert S. Mirin's repeated attempts to offer evidence so remote and irrelevant to the issues before the Court, such as his attempt to offer evidence of the so-called "Fishing Creek Conspiracy" during the Civil War, unreasonably delayed the proceedings.

144. The sanctions hearing, which

totalled seven hearing days including the 6-day initial hearing and 1 day supplemental, was unreasonably delayed by the unreasonable conduct of Robert S. Mirin, as indicated by this Court's Findings of Fact No. 91, 103, and 141-144.

145. Under the circumstances, the 64.70 hours expended by Samuel E. Klein during October, 1994 for preparation and participation in the hearing on the Motion for Sanctions was entirely reasonable and necessary.

146. Samuel E. Klein agreed to limit his request for compensation for the continued hearing conducted on December 9, 1994, to 4.50 hours to the time actually spent while the court was in session.

147. The 4.50 hours expended by Samuel E. Klein on December 9, 1994 was reasonable and necessary.

148. Samuel E. Klein expended a total of 84.20 hours in connection with this matter for which compensation is sought, as

follows:

May - September, 1994	15.00 hours
October , 1994	64.70 hours
December 9, 1994	4.50 hours
	84.20 hours

149. The 84.20 hours expended by Samuel E. Klein were reasonable and necessary and represent the excess attorney's time spent by him as a result of the sanctionable conduct of Robert S. Mirin.

150. Jacquelyn J. Fatula is a 1989 graduate of Johns Hopkins University and received her J.D. degree from Temple University School of Law in 1992, where she was a member of the Temple Law Review.

151. Jacquelyn J. Fatula is an associate at Dechert Price & Rhoads, where she has been employed since September, 1992.

152. Since joining Dechert Price & Rhoads, Jacquelyn J. Fatula has assisted in the defense of defamation and privacy actions.

153. Jacquelyn J. Fatula's normal billing rate is $125 per hour.

154. Jacquelyn J. Fatula's rate is comparable to rates of other attorneys in the Philadelphia area with similar experience.

155. The rate charged for Jacquelyn J. Fatula is the rate actually paid by the media defendants herein.

156. Jacquelyn J. Fatula's work in this matter was of the highest quality and consistent with her experience.

157. Jacquelyn J. Fatula's hourly rate of $125 per hour is fair and reasonable.

158. Jacquelyn J. Fatula expended a total of 88.60 hours in representing the media defendants herein from May 17, 1994 through September 30, 19994, as follows:

May, 1994	6.90 hours	(Ex. D15 and Ex. D21, page 2)
June, 1994	52.20 hours	(Ex. D16 and Ex. D21, page 3)
July/August, 1994	19.25 hours	(Ex. D17 and Ex. D21, page 4)

September, 1994 — 10.25 hours (Ex. D18 and Ex. D21, page 5)

88.60 hours

159. The 88.60 hours expended by Jacquelyn J. Fatula was reasonable and necessary for the defense of this action.

160. The time expended by Jacquelyn J. Fatula was necessitated by the bad faith conduct of Robert S. Mirin and represents the excess attorneys' time spent by Jacquelyn J. Fatula as a result of the sanctionable conduct of Robert S. Mirin.

161. Jacquelyn J. Fatula expended a total of 72.85 hours during the month of October, 1994 in preparation for and presentation of the media defendants' Motion for Sanctions (Ex. D40, page 4).

162. Under the circumstances, the 72.85 hours expended by Jacquelyn J. Fatula during October, 1994 for preparation and participation in the hearing on the Motion for Sanctions was reasonable and necessary.

163. Jacquelyn J. Fatula expended a

total of 161.45 hours in connection with this matter for which compensation is sought.

164. The 161.45 hours spent by Jacquelyn J. Fatula was reasonable and necessarily incurred and represents the excess hours caused by the sanctionable conduct of Robert S. Mirin and the time expended in connection with the Motion for Sanctions.

165. Vernon L. Francis is a 1982 graduate of Haverford College and received his J.D. degree from the University of Pennsylvania in 1987 where he was editor-in-chief of the Law Review.

166. Vernon L. Francis, following a judicial clerkship for The Honorable Louis H. Pollack of the United States District Court for the Eastern District of Pennsylvania, was employed by Schnader, Harrison, Segal & Lewis of Philadelphia from September, 1988 to July, 1989; thereafter, he served in the Office of the

Special Prosecutor for Iran/Contra until June, 1992.

167. Since joining Dechert Price & Rhoads in 1992, Vernon L. Francis has been engaged in the defense of defamation and privacy actions.

168. Vernon L. Francis' normal billing rate is $195 per hour.

169. Vernon L. Francis' billing rate is comparable to rates of other attorneys in the Philadelphia area with reasonably comparable skill and experience.

170. The rate charged by Vernon L. Francis is the rate actually paid by the media defendants herein.

171. Vernon L. Francis' hourly rate of $195 per hour is fair and reasonable.

172. Vernon L. Francis expended a total of 14 hours in representing the media defendants herein from May 17, 1994 through September 30, 1994, as follows:

June, 1994 5.30 hours (Ex. D16 and Ex. D21, page 3)

July/August,

1994 8.20 hours (Ex. D17 and Ex. D21, page 4)

September, 1994 .50 hours (Ex. D18 and Ex. D21, page 5)

14.00 hours

173. The 14 hours spent by Vernon L. Francis was reasonable and necessarily incurred in connection with defense of the action and preparation of the Motion for Sanctions.

174. The time expended by Vernon L. Francis was necessitated by the bad faith conduct of Robert S. Mirin and represents the excess attorneys' time spent by Vernon L. Francis as a result of the sanctionable conduct of Robert S. Mirin.

175. Sheryl J. Cohen is a 1988 graduate of the University of Pennsylvania School of Law. She was employed for 5-1/2 years by the Los Angeles, California firm of Paul, Hastings, Janofsky & Walker, and joined Dechert Price & Rhoads in April, 1994.

176. Sheryl J. Cohen's billing rate is $185 per hour.

177. Sheryl J. Cohen's billing rate is comparable to the rates of other attorneys in Philadelphia with similar skill and experience.

178. Sheryl J. Cohen's hourly rate of $185 is fair and reasonable.

179. In October, 1994, Sheryl J. Cohen expended 4.00 hours doing legal research in preparation for an anticipated motion by Robert S. Mirin to disqualify the trial judge during this hearing.

180. Although no such motion was made, Robert S. Mirin did clearly indicate in open court an intention to file such a motion.

181. Research by counsel for the media defendants in preparation of an answer to plaintiffs' counsel's anticipated motion is both necessary and proper.

182. The four hours spent by Sheryl J. Cohen was reasonably and necessarily incurred as a result of the representations made by Robert S. Mirin during the course

of the hearing on the Motion for Sanctions.

183. The fees reasonably incurred by counsel for the media defendants are as follows:

	Fees
May 17, 1994 - September 30, 1994	$19,011.25 (Ex. D21)
October, 1994 (Ex. D40)	29,965.75
December 9, 1994 hearing	1,395.00
	$50,372.00

184. The lodestar amount of fees is $50,372.00.

185. Expenses incurred in connection with presentation of the first hearing on the motion for sanctions were $2,449.90 (Ex. D40, page 6).

186. Expenses incurred in connection with the December 9, 1995 hearing on the Motion for Sanctions were $158.57.

187. The total expenses of $2,608.47 were reasonably incurred in connection with the Motion for Sanctions.

188. The expenses incurred were fair and reasonable.

189. The expenses incurred represent excess expenses caused by the sanctionable conduct of Robert S. Mirin.

190. The total fees and expenses incurred were $52,980.47.

191. The excess costs, expenses and attorneys' fees reasonably incurred by the media defendants because of Robert S. Mirin's willful bad faith and unreasonable conduct are $52,980.47.

III. Discussion.

Pursuant to 28 U.S.C. §1927, a court may impose sanctions on counsel for engaging in conduct that "multiplies the proceedings in any case unreasonably and vexatiously." 28 U.S.C. §1927 (1980). Under §1927, a court may require that counsel personally satisfy "the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct." Id. Sanctions under §1927 are directed at the offending attorney and may

not be imposed upon his clients. Williams vs. Giant Eagles Markets, Inc., 883 F.2d 1184, 1190 (3d Cir. 1989).

A requisite element to impose sanctions under §1927 is a finding of willful "bad faith." Willams, 883 F.2d at 1190-91; Ford vs. Temple Hosp., 790 F.2d 342, 347 (3d Cir. 1986). A district court may impose sanctions if it finds the "'plaintiff's actions was frivolous, unreasonable, or without foundation, even though not in subjective bad faith.;" Ford, 290 F.2d at 350, quoting Christianburg Garment Co. vs. EEOC, 43 U.S. at 421-22. The Court of Appeals for the Third Circuit has stated that the "intentional advancement of a baseless contention that is made for an ulterior purpose, e.g., harassment or delay" may be indicative of bad faith. Id. at 347. Similarly, sanctions are appropriate under §1927 where a party continues to pursue claims after having been formally or informally notified that

these claims were barred by the statute of limitations. See Fred A. Smith Lumber Co. vs. Addition, 845 F.2d 750 (7th Cir. 1988); Matthews vs. Freedman, 128 F.R.D. 194, 207 (E.D. Pa. 1989) (Gawthrop, J.). A finding of "bad faith" is a factual determination to be made by the court.

Under §1927, even if a lawsuit was initially filed in good faith, sanctions may be imposed on an attorney for all costs and fees incurred after the continuation of the suit which is deemed to be in bad faith. Id. See Ford, 790 F.2d at 350.

Furthermore, "[o]nce a finding of bad faith has been made, the appropriateness of sanctions is a matter entrusted to the discretion of the district court." Quiroga vs. Hasbro, Inc., 934 F.2d 497, 505 (3d Cir. 1991), citing Hackman vs. Valley Fair, 932 F.2d 239, 242 (3d Cir. 1991), cert. denied, 112 S.Ct. 376 (1991).

Additionally, this Court has the inherent powers to impose sanctions,

including attorney's fees, on counsel for bad faith conduct. Chambers vs. Nasco, Inc. ___ U.S. ___, 111 S.Ct. 2123, 2134 (1991). This Court's inherent power to impose sanctions for such conduct is not displaced by statute or by rule. Id. at 2134-35. Sanctions may be imposed "to promote judicial efficiency, and to deter abuse of judicial process." Quiroga, 934 F.2d at 505. Under this inherent power, a court may award attorney's fees and require that counsel pay them personally, if it is found that he acted in bad faith. Landon vs. Hunt, 938 F.2d 450, 454 (3d Cir. 1991).

A review of the Boykin I and Boykin II complaints makes clear that the Plaintiffs had no basis in fact or law for their defamation claims and their assertion of civil rights offenses against the media defendants was patently frivolous. Indeed, Mr. Mirin did not have in his possession any articles claimed to be false and defamatory at the time he filed the Boykin

I and Boykin II complaints or at the time he refused to dismiss Boykin II.

Although Mr. Mirin's good faith in filing Boykin I is doubtful, it cannot be seriously questioned that the filing and pursuit of the claims in Boykin II were frivolous and outrageous. First, when the Boykin II complaint was filed, Eyerly was no longer a defendant in this matter and had been dismissed pursuant to a state court order. Second, at the time the Boykin II complaint was removed to federal court, the Plaintiffs' identical claims against the media defendants had already been dismissed on their merits. Third, after having been given written notice that Plaintiffs could not assert claims as to Defendant Eyerly, that Plaintiffs' state law claims were time-barred and that the media defendants intended to seek counsel fees, Mr. Mirin refused to withdraw these claims.

In fact, Mr. Mirin was put on notice two

time by the media defendants and once by this Court that his state law claims as to the Press-Enterprise were time barred. Mr. Mirin, however, continued to pursue these time-barred claims. Thus, Mr. Mirin unreasonably and unnecessarily forced the media defendants to file a second motion to dismiss and to participate in preparing the case management plan for this case.

Mr. Mirin's clients would in no way have been prejudiced by the dismissal of the Boykin II complaint as it presented issues identical to those raised in the Boykin I complaint.

By continuing to maintain this action, by continuing to cause the media defendants to incur significant legal fees and expense, and by continuing to burden this Court with the identical arguments already rejected, Mr. Mirin has violated his duty to proceed in good faith and in a manner designed to achieve justice. The media defendants should simply not be subjected

to such outrageous conduct and be burdened with the cost and expense of repeatedly litigating the same claims.

We are of the view that sanctions should be imposed on Mr. Mirin because he has engaged in bad faith, harassing and vexatious litigation by pursuing these claims, which has so multiplied the proceedings in this case as to cause unnecessary burden and expense on the media defendants.

The standard utilized to calculate the proper award of attorney's fees under 28 U.S.C. §1927 is the lodestar method. The lodestar fee is calculated by multiplying a reasonable hourly rate by the number of hours reasonably expended on the suit. Matthews vs. Freedman, 128 F.R.D. at 207. See also Hensley vs. Eckerhart, 461 U.S. 424, 433 (1983).

The sanctions hearing, which totalled seven days including the 6-day initial hearing and 1 day supplemental hearing, was

inordinately delayed by the unreasonable conduct of Mr. Mirin and his grossly evasive and lengthy answers to questions while on the stand, as indicated by this Court's Findings of Fact No. 91 and 103. Mr. Mirin's constant and flagrant interruption of this Court, despite repeated warnings, further delayed the sanctions hearing. Moreover, Mr. Mirin's repeated attempts to offer evidence remote and irrelevant to the issues before the Court also unreasonably delayed these proceedings, as indicated by this Court's Findings of Fact No. 141-44.

Under these circumstances, the total number of hours expended by counsel for the media defendants in connection with this matter was entirely necessary and reasonable and represents the excess attorney's time spent by them as a result of the bad faith and sanctionable conduct of Mr. Mirin, as indicated by this Court's Findings of Fact No. 148, 149, 163, 164,

172, 173, 174, and 182.

In addition, the hourly rates claimed by each individual attorney assisting in the representation of the media defendants reflect the actual hourly rates paid by the media defendants and are reasonable based on the respective skills and experience of counsel for such defendants, as indicated by this Court's Findings of Fact.

The lodestar amount of fees is $50,372, as indicated by this Court's Finding of Fact No. 184. The total expenses incurred in connection with the presentation of both sanctions hearings is $2,608.47. These expenses were reasonably incurred and represent excess expenses caused by the sanctionable conduct of Mr. Mirin, as indicated by this Court's Findings of Fact No. 185-189. As a result, the lodestar of fees and expenses caused by the sanctionable conduct of Mr. Mirin and incurred by the media defendants is $52,980.47. We are of the view that there

are no reasons to depart upwards or downwards from the lodestar.

We are aware that the amount of sanctions imposed may seem high. However, they reflect the regular hourly rates of counsel for the media defendants and to impose less would put additional costs on the media defendants. Were we to do otherwise, we may deter an aggrieved party from instituting an action for sanctions because a wrongdoer may so multiply the sanctions proceedings that the wronged party may be required to pay additional counsel fees in connection with the motion for sanctions, thus chilling its right to move for sanctions.

IV. Conclusions of Law.

1. Pursuant to 28 U.S.C. § 1927, this Court may impose sanctions on counsel for engaging in conduct with "multiplies the proceedings in any case unreasonably and vexatiously." 28 U.S.C. § 1927 (1980).

2. Under § 1927, counsel "may be

required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. § 1927 (1980).

3. Robert S. Mirin acted in willful bad faith in this case as set forth in the findings of fact.

4. The legal theories enunciated by Mr. Mirin were pursued and maintained in bad faith.

5. Robert S. Mirin acted in this case in a manner which was unreasonable and the legal theories on which he relied relating to libel and invasion of privacy were without foundation.

6. In light of Robert S. Mirin's conduct in continuing to pursue claims of libel and invasion of privacy against the media defendants in bad faith after being notified that such claims were time-barred, sanctions should be imposed upon plaintiff's counsel.

7. Sanctions will be imposed upon Robert

S. Mirin to deter abuse of the judicial process, to promote judicial efficiency and to penalize him for his bad faith conduct.

8. The standard utilized to calculate the proper award of attorney's fees under 28 U.S.C. § 1927 is the lodestar method.

9. The total number of hours expended by counsel for the media defendants in connection with this action is reasonable.

10. The hourly rates claimed by each individual attorney assisting in the representation of the media defendants are reasonable based on their respective skills and experience.

11. The lodestar amount of fees incurred by the media defendants is $50,372.00.

12. The lodestar amount of $50,372.00 is reasonable.

13. The lodestar of fees and expenses incurred by counsel for the media defendants as a result of Robert S. Mirin's willful bad faith and unreasonable conduct

was $52,980.47.

14. The lodestar amount of fees represents the fair and reasonable value of the services rendered, taking into account the novelty and complexity of the issues presented in the case, the special skills and experience of counsel involved, the quality of the representation and the result achieved.

15. Robert S. Mirin unnecessarily and in bad faith protracted the proceedings regarding the Motion for Sanctions.

16. Robert S. Mirin's conduct before and during the hearing on the Motion for Sanctions caused undue burden and expense to the media defendants.

17. The media defendants should not be penalized in their request for an award of sanctions because of the unreasonable conduct of Robert S. Mirin in protracting the proceeding and thereby increasing the cost to defendants.

18. It would violate and frustrate the

Congressional policy behind 28 U.S.C. § 1927 to permit an attorney to make the process of seeking sanctions against him for willful, bad faith conduct so prohibitively expensive so as to deter parties from seeking to recover sanctions.

19. Robert S. Mirin should bear full legal responsibility for the fees and costs reasonably incurred as a result of the unnecessarily protracted sanctions proceedings.

20. There is no reason to depart upwards or downwards from the lodestar.

21. Sanctions will be imposed on Robert S. Mirin in the amount of $52,980.47.

An appropriate order will be entered.

_____

MUIR, U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MICHAEL R. BOYKIN, et al.,	:	
Plaintiffs	:	No. 4:CV-94-306
v.	:	Complaint Filed 3/2/94
BLOOMSBURG UNIVERSITY OF PENNSYLVANIA, et al.,	:	(Judge Muir)
Defendants	:	

ORDER

January , 1995

1. Judgment is entered against Robert S. Mirin, Esq. personally and in favor of Paul Eyerly, III, and Press Enterprise, Inc., in the amount of $52,980.47.

2. Robert S. Mirin shall pay to Paul Eyerly, III and Press Enterprise, Inc., within 120 days the sum of $52,980.47.

_____

MUIR, U.S. District Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 95-7096

MICHAEL R. BOYKIN; MARGARET L. BOYKIN;
AARON M. BOYKIN,

V.

BLOOMSBURG UNIVERSITY OF PENNSYLVANIA;
DR. ROBERT PARISH, Vice President;
DR. CURTIS ENGLISH, President; DR HARRY
AUSPRICH, Former President; MARGARET
MANNING, Director of Personnel; IRVING
WRIGHT, Associate Professor; JOHN WALKER,
Retired Vice President for University
Advancement; VIRGINIA MCAFEE, Ex-University
Employee; DAVID FENTON;
SALLIE SAMSEL; University Employee; LT.
DEBORAH BARNES, University Police Force;
WILLIAM KREISHER, Esquire; CAPTAIN WESLY
WAUGH, Troop H, State Police, Hazelton
Barrack, Pennsylvania; UNKNOWN STATE
TROOPERS AND AGENTS; CAPTAIN LARRY SMITH,
Chief of Police, Bloomsburg, Pennsylvania,
all in their Official and Individual
capacities; PAUL EYERLY, III, Publisher;
PRESS ENTERPRISE NEWSPAPER;
CHARLES CONFER

MICHAEL R. BOYKIN, MARGARET L. BOYKIN,
Appellants

(M.D. Pa. Civ. No. 94-cv-00306)

Present: SLOVITER, Chief Judge, BECKER,
STAPLETON, MANSMANN, GREENBERG, HUTCHINSON,
SCIRICA, COWN, NYGAARD, ALITO, ROTH, LEWIS,
McKEE and SAROKIN, Circuit Judges

SUR PETITION FOR PANEL REHEARING
WITH SUGGESTION FOR REHEARING IN BANC

The petition for rehearing filed by Appellant, having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is DENIED.

BY THE COURT:

Circuit Judge

DATED: JUN 02 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MICHAEL R. BOYKIN and MARGARET L. BOYKIN	:	CIVIL ACTION
Plaintiffs,	:	No. 4:CV-94-306
v.	:	**NOTICE OF APPEAL**
BLOOMSBURG UNIVERSITY OF PENNSYLVANIA, et al.	:	
Defendants	:	

NOTICE OF APPEAL

Notice is hereby given that Plaintiffs, Michael R. Boykin & Margaret L. Boykin, in the above named case, hereby appeal to the United States Court of Appeals for the Third Circuit from the final judgment from an order imposing sanctions for attorney's fees on plaintiffs' counsel Robert S. Mirin, Esquire, entered on the nineteenth day of January, 1995.

Respectfully submitted,

Dated:
February 13, 1995

Mirin & Jacobson
Robert S. Mirin
Attorney I.D. #25305
8150 Derry Street
Harrisburg, PA 17111
(717) 561-1515

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ROBERT S. MIRIN, attorney for for MICHAEL R. BOYKIN and MARGARET L. BOYKIN Appellant	:	
v.	:	No. 95-7096
PRESS ENTERPRISE, INC. and PAUL EYERLY, III, Appellees	:	

MOTION FOR SUBSTITUTION OF PARTY BY APPELLANT

Attorney Robert S. Mirin herein moves the court as follows:

1. On February 13, 1995, the Boykins, appellants in the above named matter, by and through their counsel, Robert S. Mirin, filed a notice of appeal to this Honorable Court from the order by the Middle District of Pennyslvania imposing sanctions against Robert S. Mirin.

2. The appeal inadvertantly named the Boykins as appellants of the sanctions order.

3. Shortly thereafter, appelles filed a brief with this court to have the appeal

dismissed because the Boykins lacked standing.

4. Robert S. Mirin acknowledges the technical omission of his name from the original notice of appeal of the sanction order but believes a dismissal of this appeal, for that reason, would constitute an excessive sanction and would preclude a fair decision on the merits of the case.

5. Movant has supplied a brief in support of his motion for substitution.

WHEREFORE, pursuant to the provisions of Rule 43(b) of the Federal Rules of Appellate Procedure, Movan Robert S. Mirin moves the court for an order substituting himself as the appellant in lieu of the Boykins in the above entitled appeal.

Respectfully submitted,
MIRIN & JACOBSON

DATED:
March 24, 1995 By:

Robert S. Mirin
Attorney I.D. # 25305

Attorney for Appellant

8150 Derry Street
Harrisburg, PA
17111-5260
(717) 561-1515
san.sub

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ROBERT S. MIRIN, attorney for for MICHAEL R. BOYKIN and MARGARET L. BOYKIN Appellant	:	
v.	:	No. 95-7096
PRESS ENTERPRISE, INC. and PAUL EYERLY, III, Appellees	:	

PLAINTIFFS' BRIEF IN SUPPORT OF APPEAL MOTION

I. BACKGROUND

On February 13, 1995, Plaintiffs, appellees, by and through their counsel, Robert S. Mirin, Esquire, filed a notice of appeal to appeal the Middle District of Pennsylvania's order of January 19, 1995 imposing sanctions against Mr. Mirin in the Boykin case. On March 6, 1995, defendants, appellees, Paul Eyerly, III, and Press-Enterprise, as directed by this court's order of February 23, 1995, filed a brief contesting appellants standing to appeal.

II. ARGUMENT

Plaintiffs' counsel and movant, Robert

S. Mirin, should be allowed to appeal the Sanction Order because the inadvertant omission of Robert S. Mirin, as appellant, from the original notice of appeal is harmless and there is no possibility the omission misled the appellees.

Counsel acknowledges the oversight and now seeks to cure the technical omission by substituting his name as appellant in this matter. Counsel was under the belief that the technical oversight would be corrected and that the signing of the appeal constituted proper procedure. Counsel acknowledges this and submits this brief to support his request for substitution by amended appeal.

In Hays v. Sony Corp. of America, 847 F.2d 412 (7th Cir. 1988) held that an appeal should not be dismissed where there is no possibility that the appellant's technical non-compliance with Rule 3(c) of the Fed.R.App.P. 3(c) misled the appellee, and when the "non-compliance" is harmless.

Forfeiture of the right of appeal constitutes an excessive sanction in these circumstances. In Hays, the notice of appeal from a sanction order against the attorney, designated only the appellant/plaintiff, and not the attorney upon whom sanctions were imposed. The appellees acknowledged that the attorney was attempting to appeal from the sanctions imposed against him. See also Foman v. Davis, Executrix, 371 U.S. 178, (Citing Conley v. Gibson, 355 U.S. 41, 48, "the Federal Rules reject the approach that pleading is a game...in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.")

This appeal falls squarely on the facts in Hays. The technical/ministerial inaccuracy is not one which should dispose of the important issues on appeal.

The appellees are well aware that the

sanctions in question are directed only against counsel personally, the party who seeks to appeal the sanction order (See page 4 of their brief, "because he (Mr. Mirin) could have pursued his own appeal").

The appellee's brief seeks to have the Boykins' right to appeal dismissed for lack of standing. Appellees apply this argument to preclude review of the sanctions in question; an appeal which is otherwise legitimate and timely. This hyper-technical position is neither grounded in logic or experience. There is no sound policy reason why the clients' lack of standing to appeal should affect an otherwise timely right to appeal. Appellees acknowledge that Plaintiffs counsel's was the only active party seeking to appeal. The purpose of the Federal Rules of Appellate Procedure is to provide a right to appeal not deny that right merely becuase of a clerical/inadvertant/ procedural error.

In conclusion, this court has the jurisdiction and authority to include or substitute Robert S. Mirin as a party to the in excess of $52,000 sanction order directed against him exclusively. The Federal Rules of Appellate procedure and the applicable case law clearly establishes a right to a meaningful appeal.

WHEREFORE, Robert S. Mirin respectfully requests this Honorable Court to allow and grant his right to appeal the sanction order by the Middle District of Pennsylvania of January 19, 1995.

Respectfully submitted;

Dated:

April 5, 1995

Mirin & Jacobson
Robert S. Mirin
Attorney I.D. #25305
8150 Derry Street
Harrisburg, PA 17111
(717) 561-1515

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-7096

Boykin v. Bloomsburg University

To: Clerk

1) Motion by attorney Robert S. Mirin, for Substitution of Party.

The foregoing Motion is referred to the motions panel which will consider the jurisdictional issue.

For the Court,

Clerk

Dated: APR 13 1995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
April 4, 1995
A-84

No. 95-7096

MICHAEL R. BOYKIN, et al.
v.
BLOOMSBURG UNIVERSITY OF PENNSYLVANIA, et al.
MICHAEL R. BOYKIN, et al., Appellants
(M.D. (Scranton) of Pa. Civil. No. 94-cv-00306 (MM))

Present: BECKER, HUTCHINSON and ALITO, Circuit Judges.

Motion by Robert S. Mirin, Esquire, Retained Counsel for Appellants, to substitute himself as Appellant in lieu of Appellants in Appeal.

For the Court's information, a copy of the Clerk's 4/13/95 Order referring the motion to the motion panel is attached.

Anthony Infante 597-3137
Deputy Clerk

Appellants' Brief & Appendix due 5/1/95.

O R D E R

The foregoing motion is denied.

By the Court,

Circuit Judge

Dated: APR 27 1995

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 95-7096

Re : Boykin v. Bloomsburg University

Present: BECKER and ALITO, Circuit Judges

1. Motion by appellants for reissuance of the June 2, 1995 order.

2. The order dismissing this appeal was filed on April 27, 1995 and the order denying the petition for rehearing was filed on June 2, 1995.

3. The response submitted by Appellees was filed on September 15, 1995.

Colleen McKeown
Deputy Clerk
Direct Dial 597-4495

O R D E R

The forgoing motion is/~~are~~ denied.

By the Court,

Circuit Judge

Dated: SEP 28 1995